STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Before: Doctoroff, P.J., and Holbrook, Jr. and Smolenski, JJ.)

ROBERT and PATRICIA STOKES,

Plaintiffs/Appellants/
Cross Appellees

Supreme Court Docket No. 119074

-vs-

MILLEN ROOFING COMPANY,

Defendant/Appellees/
Cross Appellant

_____/

BRIEF ON APPEAL – CROSS APPELLANTS

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STATEMENT OF THE BASIS OF JURISDICTION

Defendant appeals the decision of the Court of Appeals dated March 9, 2001, *(Appendix Page 197) in which the Court of Appeals denied Defendants' Cross-Appeal.* Inherent in that appeal was the Trial Court's dismissal of Defendant's Counter-Claim against the Plaintiffs and its dissolution of Defendant's Construction Lien. That Trial Court Order which is also appealed is dated December 2, 1994, and attached hereto at Appendix Page 112.

Defendant seeks a reversal of that portion of the March 9, 2001 Opinion of the Court of Appeals which affirmed the Trial Court's Grant of Summary Disposition, dismissing Defendant's Counter-Claims and discharging the Construction Lien against Plaintiffs' property. Defendants further seek remand of this matter to the Trial Court for entry of a money Judgment in Defendant's favor and against Plaintiffs. Defendant also seeks remand to the Trial Court for trial of its dismissed counts.

Defendant filed an Application for Leave to Appeal which was granted November 20, 2001, as to the first issue raised in the Application.

STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S SUMMARY JUDGMENTS DISMISSING DEFENDANT'S COUNTER-COMPLAINT AGAINST PLAINTIFFS AND DISSOLVING ITS CONSTRUCTION LIEN ON PLAINTIFFS' PROPERTY BASED SOLELY UPON THE FACT THAT DEFENDANT WAS NOT LICENSED AS A RESIDENTIAL BUILDER.

The Court of Appeals answered "No."

Plaintiffs/Cross-Appellees answer "No."

Defendant/Cross-Appellant would answer "Yes."

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The Plaintiffs are litigious people. This statement is not so much one of reputation, but one of explanation as to how the unique facts of this case were created.

Dr. Robert and Patricia Stokes, Plaintiffs/Appellants, hereinafter the "Stokes", own property located in East Grand Rapids, Michigan. In 1992 the Stokes first contracted with Doug Sumner Builder, Inc. to add a multimillion-dollar addition to their house. The Stokes retained architect Chuck Postema for the addition project. Soon, however, the Stokes became dissatisfied with Mr. Sumner and fired Doug Sumner Builder, Inc: and Chuck Postema. Later the Stokes sued Doug Sumner Builder, Inc and Chuck Postema. The Stokes successfully avoided paying Doug Sumner Builder, Inc. by asserting that Doug Sumner Builder, Inc. was not licensed (although Doug Sumner, the individual, was). The court decision against Doug Sumner Builder, Inc., was received by the Stokes before their relationship with Millen Roofing. (Appendix Pages 156, 211, 218) This prior lawsuit knowledge was critical to the trial court's ruling.

The Stokes then retained Summit Construction, Inc. hereinafter referred to as "Summit", a licensed builder as contractor and Design Plus as the second architect for the addition project. The Stokes' contract with Summit included the installation of the roof. (Appendix Pages 221, 234) Soon the Stokes fired Design Plus as architect and hired Tom Dowling as third architect. The Stokes thereafter sued Design Plus.

As part of Summit's contract with the Stokes, Summit subcontracted Detroit Cornice to install a slate roof on the Stokes' house. However, the Stokes became dissatisfied with Detroit Cornice and demanded Summit find another roofing subcontractor. Since there are very few companies qualified to install slate roofs in the

country, Summit had obtained a proposal from Millen Roofing Company, hereinafter referred to as "Millen Roofing", a Wisconsin corporation. (Appendix Page 131) Millen Roofing is the Appellant in this appeal. The proposal Millen provided to Summit appears at Appendix Pages 208 to 210. Summit obtained the construction permit from the City of East Grand Rapids, which included the roof. (Appendix Page 207)

Mrs. Stokes decided to contract directly with Millen Roofing (Appendix Pages 236, 132, 133), which was allowed by their contract with Summit. Consequently, instead of working for Summit, a licensed contractor, Millen Roofing ended up working for Mrs. Stokes, an unlicensed contractor. However, the roof remained under Summit's building permit and Summit remained responsible that the roof was installed according to East Grand Rapids building codes. Millen Roofing believed it would still be operating under Summit's builder's license even though its contract was with the Stokes. (Appendix Pages 147, 148) Even though Millen Roofing's contract was directly with Mrs. Stokes, Millen Roofing's work was supervised not only by Summit but also by the Stokes' architect, Tom Dowling, and George Schuler, a roofing expert from Ohio who was hired by Mrs. Stokes as a consultant. (Appendix Pages 140, 146) Mrs. Stokes insisted that slate purchased by Detroit Cornice (under Summit) (Appendix Page 141) be used by Millen. Millen Roofing's belief that it did not need to be licensed was substantially rooted in representations from Mrs. Stokes that Millen did not need to be licensed and that Mrs. Stokes would take care of licensing. (Appendix Pages 135-137, 152) Mrs. Stokes made these misrepresentations in an effort to speed Millen to the job. Mrs. Stokes made these representations knowing she previously used the Residential Builders Act to her advantage to get "free" construction services from Doug Sumner

Builder, Inc., under the same "licensing" claim she employs in this case. (Appendix Pages 156, 211, 218, 159-160)

As per their pattern, the Stokes soon tired of Summit and discharged it and hired Mike Rottschafer as a general contractor. Mike Rottschafer was also a licensed builder who then supervised Millen Roofing's work along with Tom Dowling, the architect, and George Schuler, the Stokes' roofing expert. To protect itself, Summit placed a lien on Stokes' home in excess of $100,000. After the Stokes discharged Summit, they sued Summit Construction, a case which has since been settled for more than Summit's original lien placed on the Stokes' house.

Eventually, the Stokes tired of Millen Roofing and discharged it. Then the Stokes sued Millen Roofing, seeking over a hundred thousand dollars for damages for breach of contract and for the removal of Millen Roofing's construction lien. (Appendix Page 1) Naturally, this did not occur until the roof had been completed and One Hundred Thirteen Thousand Two Hundred Sixty-nine Dollars ($113,269.00) was admitted owing. (Appendix Pages 153, 154) Millen Roofing filed a counterclaim alleging (among other things) breach of contract, enforcement of the construction lien, and quantum meruit recovery. (Appendix Page 19) Millen claimed $141,766 ($193,700 less $51,934) was owed. (Appendix Page 251)

The Stokes filed a Motion for Summary Disposition claiming Millen Roofing could recover no damages under MCL 339.2412; MSA 18.425 (2412) ("Residential Builders Act") which they claim prohibits an unlicensed residential builder from bringing or maintaining an action in a court for collection of compensation for the performance of an act or contract for which a license was required under Chapter 24. (Appendix Page 40)

Millen opposed the Motion (Appendix Page 58) The Trial Court granted the Stokes' motion, dismissed all of Millen Roofing's complaint and dissolved the construction lien against the Stokes' house -- all without considering the equity of allowing the Stokes to retain a roof which cost in excess of One Hundred Fifty Thousand Dollars ($150,000.00) without paying for it. (Appendix Page 112)

After the court granted the Stokes' Motion for Summary Disposition, the court allowed Millen Roofing to file an Amended Complaint. (Appendix Page 114) A subsequent Motion for Summary Disposition was filed and the Court again granted the motion as to all of the counts of the Amended Counter-Complaint except for a count seeking the removal of the roof and a count asserting accord and satisfaction. The Stokes withdrew their Complaint a few days prior to trial after recognizing that their allegations were frivolous. (Appendix Page 130)

A trial was held on Millen Roofing's two remaining counts. The Trial Court entered a unique judgment because it thought that it could not legally award any damages to Millen Roofing for the roof due to the provisions of the Residential Builders Act. (Appendix Pages 161, 192) In essence, the Court allowed Millen to remove its materials unless the Stokes wanted to keep the roof, in which case the Stokes would have to pay the amount they admitted was due. Specifically, the judgment allowed Millen Roofing to deposit the sum of Fifty-one Thousand Nine Hundred Thirty-four Dollars ($51,934.00) into escrow (the amount the Stokes had paid toward the roof), at which time Millen Roofing would have the right to remove the roof from the Stokes' home. If Millen Roofing did not deposit the Fifty-one Thousand Nine Hundred Thirty-four Dollars ($51,934.00) into escrow, it would lose its right to remove the roof from the

Stokes' home. If Millen Roofing did deposit the money into escrow, the Stokes would have the opportunity to accept repayment of $51,934.00 or deposit One Hundred Thirteen Thousand Two Hundred Sixty-nine Dollars ($113,269.00) into escrow which would keep Millen Roofing from removing the roof from their home. If the Stokes did deposit the One Hundred Thirteen Thousand Two Hundred Sixty-nine Dollars ($113,269.00) into escrow, the escrow agent was instructed to remit to Millen Roofing all of the money in escrow, plus any accrued interest. Millen Roofing deposited its Fifty-One Thousand Nine Hundred Thirty Four Thousand Dollars ($51,934.00) into escrow, however the Stokes appealed and obtained a stay of proceedings until this appeal is resolved.

After the Stokes' appealed the Trial Court Judgment, Millen Roofing cross-appealed the Trial Court's initial granting of the Stokes' Motion for Summary Disposition because the trial court removed the lien on the Stokes' home without addressing the equity of the case. Millen Roofing believes that the trial court should have entered a Judgment against the Stokes for the full amount of the contract price as a condition of removing the construction lien. However, the Trial Court's attempt to do equity during the course of the litigation, even after it nullified Millen Roofing's construction lien, is justified and was sustained on appeal.

The Court of Appeals sustained the Trial Court's Judgment, although not willingly. (Appendix Page 197) It felt that it was bound to sustain the Trial Court based upon Republic Bank v Modular One, LLC, 232 Mich App 444, 591 NW2d 335 (1998) based upon MCR 7.215(H). Appellant believes that in part, the Court of Appeals did not understand the equities of the case as did the Trial Court. On Appeal, Defendant relied

primarily on the binding effect of Republic Bank, while Plaintiffs spent a great deal of effort castigating the Defendant. In doing so, Plaintiffs apparently created some misplaced sympathy. Bad facts can make bad law. But for Republic Bank, it appears that would have happened in this case.

This case involves interpretation of the Residential Builder's Act ("RBA"), MCL 339.2401 *et seq.*; MSA 18.425 (2401) *et seq.* Defendant Millen Roofing Company is not licensed pursuant to the Residential Builder's Act. The Trial Court and the panel of the Court of Appeals have improperly assumed that the failure to be licensed has significant negative impact on Millen Roofing's ability to collect for the work that it did for the Stokes. The assumption that Millen is barred from collecting for its work is not justified by the plain reading of the statute involved.

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING MOST OF DEFENDANT'S COMPLAINT BASED UPON THE RESIDENTIAL BUILDERS ACT.

Standard of Review. The Supreme Court reviews cases in equity de novo; however, the trial court's findings of fact are not be disturbed on appeal unless clearly erroneous and due deference is to be given to the trial court's opportunity to judge the credibility of the witnesses. Sabin-Scheiber v Sabin, 128 Mich App 427, 340 NW2d 114 (1983).

A. MILLEN ROOFING'S CLAIMS DO NOT FALL UNDER THE RESIDENTIAL BUILDERS ACT.

The trial court dismissed most of Millen's Complaint, believing it was compelled to do so under Section 2412 of the RBA. MCL 339.2412.

Section 2412 of the Residential Builders Act provides:

> "A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract." (Emphasis added)
>
> MCL 339.2412; MSA 18.425 (2412)

The Residential Builder's Act is found at MCL 339.2401 through 2412; MSA 18.425 (2401) through (2412). The Court of Appeals likewise erroneously stated:

> ". . . Because Defendant was unlicensed at the time it performed the work on plaintiffs' roof, defendant had no right to pursue a claim against plaintiffs." (Court of Appeals Opinion, pg. 3).

Such a conclusion is not warranted with a fair reading of the statute for three reasons:

1. Millen Roofing did not need to be licensed under Article 24; and
2. If Millen Roofing otherwise needed to be licensed, it did not need to do so in this instance because the transaction was exempted under Section 2403 of the Residential Builder's Act (MCL 339.2403(b); MSA 18.425 (2412).
3. Equitable exceptions do, and should, exist to the general rule.

1. Interpretation of the Statute

Where the language of a statute is clear and ambiguous, the courts must apply the statute as written. Turner v Auto Club Ins Ass'n, 448 Mich 22 528 NW2d 681 (1995). Judicial construction is not needed or even allowed. *Id.*

While recognizing that the Residential Builders Act is a "penal" statute, the Court of Appeals failed to utilize rules of construction associated with penal statutes. A penalty clause is to be "strictly construed in favor of the person being penalized." Washburn v Michailoff, 240 Mich App 669, 677, 613 NW2d 405 (2000); Ellison v Detroit, 196 Mich App 722, 723, 493 NW2d 523 (1992).

A second interpretory reason that the RBA must be strictly construed is that it is in derogation of the common law. At common law, parties could contract and enforce contracts without being licensed. Statutes which abrogate common law or are a derogation of common law must be narrowly and strictly construed. People v Powell, 280 Mich 699, 274 NW 372 (1937); B & B Inv Group v Gitler, 229 Mich App 1, 581 NW2d 17 (1998); Smith v YMCA of Benton Harbor/St. Joseph, 216 Mich App 552, 550 NW2d 262

(1996), app denied 454 Mich 863, 558 NW2d 733; Lincoln v Gupta, 142 Mich App, 615, 370 NW2d 312 (1985); McKinnunen v Bohlinger, 128 Mich App 635, 341 NW2d 167 (1983)

2. The statute, read literally, does not limit suit by an unlicensed builder.

Had the Court of Appeals taken a look at the clear language of the statute and applied normal rules of construction to that language, this panel of the Court of Appeals would not have had to address the Republic Bank decision.

Although the Court of Appeals reached the right conclusion because of the binding effect of Republic Bank, supra, the conclusion was correct even without relying on the Republic Bank decision. The Court of Appeals stated:

> "This Court is also concerned with the apparent lack of deference to our Legislature demonstrated by the *Republic Bank* decision. The penalty contained in MCL 339.2412; MSA 18.425(2412) was enacted more than forty years ago and the language of the statute has not changed significantly during that time. *See Alexander v Neal,* 364 Mich 485, 486-487; NW2d (1961). Regardless of how unjust the statutory penalty might seem to this Court, it is not our place to create an equitable remedy for a hardship created by an unambiguous, validly enacted legislative decree. Where the meaning of the language of a statue is clear, this Court should refrain from adding judicial gloss. *Thrifty Rent-A-Car Systems, Inc. v Dep't of Transportation,* 236 Mich App 674, 678; 601 NW2d 420 (1999). Further, this Court should not depart from the literal construction of a statute unless application of the statute as written is inconsistent with the purpose of the legislation. *Id.* Although the holding of *Republic Bank* did not involve direct interpretation of a statute, this Court's extension of the equitable exception of *Kirkendall* to all situations where a property owner attempts to remove an invalid construction lien from the property's title had the same result as inappropriate judicial interpretation in that it subverted the clear intent of the Legislature." (Court of Appeals Opinion, Page 7).

This paragraph is erroneous in three significant ways:

a. Article 24 does not require a license.

First, there is no requirement of a license in Article 24. A review of Article 24 discloses there is no section where a "license was required by this article." The Court of Appeals' opinion does not address this requirement. In its discussion on the application of equity, the Court of Appeals made the statement:

> "In both Republic Bank and the present case, the defendant residential contractors had unclean hands. Both defendants violated the law by engaging in the practice of residential construction or improvement without a license. MCL 339.601(1); MSA 18.425(601)(1)" (Opinion, pg. 5). (emphasis added).

What the Court of Appeals failed to acknowledge is that the cited section is under Article 6, not Article 24. The penalty the Court of Appeals references is under Article 24. However, Article 24 does not require a license.

The penalty article of the Occupational Code is Article 6. The organizational breakdown of Occupational Code is set out in Appendix Page 256.

A review of the Sections under Article 24 shows that there is no requirement for licensing in Article 24. The Legislature cannot be presumed to have meant to use the word "chapter" when it used the specific term "article." Even if the Legislature made a mistake, the rules on construction of penal statutes mandate a strict reading in favor of Millen.

b. Section 2412 bars only suits for "collection of compensation."

Second, the language of the statute only bars suits seeking the "collection of compensation." The trial court recognized this distinction. While the Court of Appeals acknowledged that the language of the statute was clear, it's Opinion omits reference to

the clear language. The language is clear because it bars a builder from bringing or maintaining ". . . an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article." MCL 339.2412; MSA 18.425 (2412) (emphasis added). This statute is eminently clear. There is nothing in the language of the act which gives Michigan's residents the right to keep anything which they have not paid for. It simply says that some unlicensed builders may not maintain an action to collect compensation for the contract. Anyone can understand that seeking the return of one's own materials back is not compensation. A dictionary definition of compensation is something above and beyond what you started out with:

> "n 1. the act of compensating. 2. the state of being compensated. 3. something given or received as an equivalent for services, debt, loss, injury, etc.; indemnity; reparation; payment. 4. Biol. The improvement of any defect by the excessive development or action of another part of the same structure. 5. a psychological mechanism by which an individual attempts to make up for some personal deficiency by developing or stressing another aspect of personality or ability."
>
> Random House Webster's College Dictionary, 1996

Millen Roofing paid for these materials and now wants them back. The Trial Court did not award compensation.

The Trial Court went one step further for the benefit of the Stokes. The Trial Court allowed the Stokes to retain the roof by paying money into escrow. In effect, the remedy was theirs to choose. The fact that a replacement roof would cost in excess of $200,000 might make the choice somewhat obvious. Yet the choice was the Stokes'.

The Trial Court could have stopped its analysis by simply allowing Millen Roofing to reclaim its materials.

By failure to analyze the clear and unambiguous language of the statute, the Court of Appeals has assumed something which is not clearly stated in the statute. The statute prohibits only actions for "compensation." The Trial Court granted Summary Disposition as to any compensation claims but allowed non-compensation claims to go forward. Under MCL 339.2412; MSA 18.425 (2412), an unlicensed builder is not barred from bringing any action. Rather, the builder is barred only from maintaining an action . . . for the collection of compensation . . ." (emphasis added).

c. The intent of the RBA has been met.

Third, the obvious intent of Residential Builders Act is to protect Michigan's citizens from being victimized by unqualified builders. Those purposes were well met in this case, because at all times not only was there a licensed builder involved supervising the work, but one or more licensed architects. The building permit covering the roof was taken out by Summit Construction, a licensed builder. Under the building permit, Summit Construction remained responsible that the roof was installed in accordance with local building codes.

This case presents the unique factual situation where the property owner is attempting to use the Residential Builders Act as a sword and not a shield. The roof is not defective. Indeed, it may be one of the finest roofs in the State of Michigan. On the other hand, the Appellants created the very facts they are now arguing by "removing" the roofing contract from the remainder of this multi-million dollar project. In that fashion, they proceeded to get Summit's licensing protection, but did not have to pay a

contractor's fee to Summit. But most appalling is the fact that at the time they did this, the Stokes already had pulled the same "licensing defense" on the first contractor. Now the Stokes want to pull the same trick again. Even if the language of the statute clearly prohibited an unlicensed builder from bringing an action for any relief, this Court must recognize that there are equitable exceptions such as this, when an owner must be estopped from using the statute in an effort to get free goods and services out of contractors.

3 Since Patricia Stokes acted as the general contractor toward Millen Roofing, Millen Roofing is exempt from licensing under the Residential Builders Act.

Millen Roofing was a subcontractor of Patty Stokes. (Appendix Page 151) Millen Roofing contracted with Patty Stokes, an individual. The owner of the real property was a "tenants by the entireties entity", comprised of Robert Stokes and Patty Stokes. On behalf of that owner, Patty Stokes held herself out to be the contractor. Numerous sworn statements (filled out pursuant to the Construction Lien Act) identify Patty Stokes as the contractor for purposes of the Construction Lien Act. (Appendix Page 252) In addition, Patty Stokes represented to Millen Roofing that she was going to be the contractor, and after the termination of Summit Construction, obtained the building permit in her own name as contractor. (Appendix Pages 247, 254, 255) In the Sumner case, she testified she was the contractor for over $700,000 in subcontracts and sought $50,000 in compensation. (Appendix Pages 157-158) She completed spreadsheets listing her subs. (See Example at Appendix Page 253)

Patty Stokes' relationship to the project is relevant to Millen Roofing's claims. Millen believes the Residential Builders Act requires a finding that Patricia Stokes'

status was that of a contractor which provides an exemption to the Builder's Licensing Act. Therefore Millen Roofing has a right to directly seek compensation (i.e., not equitable relief) from Patty Stokes.

Michigan recognizes that "tenancy by the entireties" ownership is different than individual ownership. See Budwit v Herr, 339 Mich 265, 63 NW2d 841 (1954). That legal creation cannot neatly be ignored by the Stokes when it simply suits their purposes. Unfortunately, the Court of Appeals did not analyze these unique facts. Since Millen Roofing was a subcontractor of Patty Stokes, Millen Roofing was entitled to a construction lien against the property of both Stokes and a contract action against Mrs. Stokes. The Construction Lien Act recognizes that the contract action and the lien rights are separate rights. MCL 570.1302(2); MSA 26.316 (302). See also Old Kent Bank of Kalamazoo v Whitaker Const. Co. (222 Mich App 436, 566 NW2d 1 (1997), appeal denied, 457 Mich 858, 581 NW2d 729 (1998).

The Court of Appeals failed to recognize that an exemption is provided for the transaction (of engaging in the business of residential builder) pursuant to Section 2403 of the Residential Builders Act. MCL 339.2403(b); MSA 18.425(2403). The Court of Appeals stated:

> The act lists several exceptions to the licensing requirement, however, there is no exception for subcontractors to unlicensed property owners within the plain language of MCL 339.2403; MSA 18.425(2403). Because the Legislature did not see fit to include an exception for defendant's situation, we will not read such an exception into the statute. The Legislature is presumed to be aware of the consequences of the use or omission of language when it enacts the laws that govern our behavior. *Lumley v Univ of Michigan Bd of Regents,* 215 Mich App 125, 129-130; 544 NW2d 692 (1996).
> (Opinion, pg. 8).

Millen asserts that the Court of Appeals has misread the language of Section 2403. That language states:

> Sec. 2403. Notwithstanding article 6, [FNI] a person may engage in the business of or act in the capacity of a residential builder or a residential maintenance and alteration contractor or salesperson in this state without having a license, if the person is 1 of the following:
>
> . . .
>
> (b) An owner of property, with reference to a structure on the property for the owner's own use and occupancy.
>
> . . .
>
> MCL 339.2403(b); MSA 18.425(2403)(2). (emphasis added)

The interpretation of this Section is one of first impression. The Court of Appeals has read this as an exception to MCL 339.2412; MSA 18.425 (2412). However, the language of Section 2403, when read fairly, is much broader than an exception. It is an enabling statute. It removes Patty Stokes transactions from the prohibitions of Article 6 (MCL 339.601 *et seq.*; MSA 18.425 (601) *et seq.)* It says that an owner "may engaging in the business of or act in the capacity of a residential builder . . . [notwithstanding article 6]..." MCL 339.2403; MSA 18.425 (2403). This section not only excuses Mrs. Stokes from obtaining a license but also takes Mrs. Stokes' whole "project" outside the scope of Article 6. The logical conclusion is that Millen's work on an exempted project is not subject to the licensing requirements of Article 6. Even if the penalties found in Article 24 apply to the licensing requirement of Article 6 generally, the "project" Millen worked on is not subject to Article 6. Again, the rules of interpretation dictate that this section be construed strictly in favor of Millen.

The Court of Appeals' reading of the exemption leads to an unintentional result when fully thought out. The Court of Appeals saw only an exemption for Mrs.

Stokes and none for those dealing with Mrs. Stokes (i.e., individuals vs. transactions exemptions). This leads to an absurd result: Mrs. Stokes is exempted from licensing but everyone she deals with would be required to be licensed. BUT if everyone she deals with must be licensed, there is no point in having an exemption in the first place. It is a cardinal rule that a statute should not be construed in a manner in which a part is rendered nugatory. Baird v Maher, 316 Mich 657 of 662, 26 NW2d 346 (1947). If possible, every part must be given effect. Klopfenstein v Rohlfing, 356 Mich 197 at 202, 96 NW2d 782 (1959). If this is what legislation intended, it should have enacted a statute that specifically required subcontractors of unlicensed contractors to be licensed.

The Court of Appeals also stated that Patricia Stokes was not acting as a general contractor. The basis for that conclusion is unknown, since virtually all of the evidence at trial pointed to the fact that Patty Stokes held herself out as a general contractor. The Trial Court in its opinion made the following observations:

> First of all, although it certainly is true that Mrs. Stokes is a housewife who has taken on the role of serving in the stead of a general contractor for much of this massive renovation project, she has picked up some considerable contact with the legal system along the way. Notably, she was in this very Court on September 3, 1993, in the Sumner Construction case, which is another piece of litigation related to this project, and, at that time and in that hearing, prevailed on an unlicensed contractor issue. That is to say, the Court granted summary disposition in her favor on an issue in the Sumner case, based on the fact that the contractor in question was not licensed in that case, either.
> . . .
>
> I am satisfied that undoubtedly at some point she indicated to Mr. Millen that she was functioning in the role of or as if she were the contractor. . . .

The Court of Appeals did not explain its conclusions and therefore must be presumed wrong as to this issue.

B. MICHIGAN CASE LAW ALLOWS FOR EQUITABLE EXCEPTIONS TO THE RESIDENTIAL BUILDERS ACT.

The Trial Court recognized that equitable exceptions exist to the RBA. The Court of Appeals would have rejected any exceptions. Millen believes that the exceptions should be more extensive than even recognized by the Trial Court.

1. The Stokes sought equity by asking the Trial Court to remove Millen Roofing's construction lien against their home. Therefore, they must do equity.

The case law is clear that a party who seeks equity must be prepared to do equity. Kirkendall v Heckinger, 403 Mich 371, 269 NW2d 184 (1978); Republic Bank v Modular One, 232 Mich App 444, 591 NW2d 335 (1998); Green v Ingersoll, 89 Mich App 228, 280 NW2d 496 (1979). Of the above cases the one that is "on all fours" with this case is Republic Bank. In the Republic Bank case an unlicensed contractor, Modular One, placed a construction lien on property owned by Republic Bank. Republic Bank filed a quiet title action to remove Modular One's lien. The Republic Bank Court stated:

> "Overall, an application of the Kirkendall equity principal seems fairly straight forward. Where one party seeks an equitable remedy against an unlicensed builder who has performed residential construction work upon property, and circumstances indicate that the builder should equitably be paid for that work, the party seeking equity must also be required to do equity by compensating the builder." Republic Bank, 591 NW2d at 339.

The Republic Bank Court summarized the law and its application to that case as follows:

> "Whether the builder holds a mortgage or a lien, or simply performed work on the property for which collection cannot be made because the builder is unlicensed, the important considerations are whether the plaintiff will benefit through equity at the expense of the defendant builder and thus whether equity requires payment for the work under the particular circumstances of the case. Here, the defendant would have been able to sue to collect on the lien, but for his unlicensed status and plaintiff seeks to avoid payments for work upon the properties that it knew were still owing that the time that it purchased the properties. In our judgment, under these circumstances, where plaintiff sought to quiet title to its property at the expense of the equitable rights of defendant, as in *Kirkendall, Green & Barbour*, plaintiff is required to do equity and pay for defendant's work on the property before it can receive the equity of an unclouded title.
>
> Applying these principles, we believe that the trial court incorrectly held that the defendants' liens were unenforceable because defendant did not have a builder's license. As a precondition to resolving plaintiff's action to quiet title, the court should have determined if defendant was entitled to payment for the work he performed on the property. Because the court concluded only that defendant's liens were invalid, the court essentially allowed MCL § 339.2412; MSA 18.425(2412) to be used as a sword rather than a shield, contrary to this Court's holdings in Parker (citations omitted)." Republic Bank 591 NW2d at 340.

The Stokes would have this Court believe that they did not seek equity in this lawsuit. That position is simply untrue. The Plaintiffs cannot deny that in their initial suit they sought not only contractual damages, but also sought to have Millen Roofing's construction lien against the property removed. The Stokes cannot deny that it sought the dissolution of Millen's Roofing's construction lien and that the Trial Court's Order dated December 2, 1994, did dissolve the construction lien against the Stokes' home. Simply put, the Stokes sought equity from the Kent county Circuit Court in this case. Consequently, they cannot deny the applicability of the Republic Bank decision to this

case. The facts of the two cases are almost identical. Republic Bank was correctly decided.

The Court of Appeals reluctantly acknowledged the existence of the rule that one who seeks equity must do equity. (Opinion pgs. 3-5). However, thereafter, the Court of Appeals then equates being unlicensed as being the same as not having clean hands. Yet that decision seems to ignore the factual situation in this case, in which the Stokes initiated the lawsuit and came to the Court asking for equitable relief. It is the Stokes, therefore, who must have clean hands prior to seeking equity from the Circuit Court. Once the Trial Court agreed to give equitable relief to the Stokes, it was obligated to give equity to Millen Roofing.

The Republic Bank, supra and Green, supra, are not the only decisions which support the Trial court's grant of equity. See also Parker v McQuade Plumbing & Heating, Inc., 124 Mich App 469, 335 NW2d 7 (1983); and Barbour v Handlos Real Estate and Bldg. Corp., 152 Mich App 174, 393 NW2d 581 (1986).

The Court of Appeals misapplied the "clean hands maxim." This maxim is to be applied to the Stokes who came to the court seeking equity:

> "[1][2] 'No citation of authority is necessary to establish that one who seeks the aid of equity must come in with clean hands.' Charles E. Austin, Inc. v Secretary of State, 321 Mich. 426, 435, 32 N.W.2d 694 (1948). The clean hands maxim is an integral part of any action in equity. The U.S. Supreme court captured the essence of the maxim when it said:
>
> '(The clean hands maxim) is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of the court of equity as a vehicle for affirmatively

> enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' Bein v Heath, 47 U.S. 228, 6 How. 228, 247, 12 L.Ed. 416.' Precision Instrument Manufacturing Co. v Automotive Maintenance Machinery Co., 324 U.S. 806, 814, 65 S.Ct. 993, 997, 89 L.Ed. 1381 (1944). (Emphasis Added).
>
> Stachnik v Winkel, 394 Mich 375 at 382.

Having sought equity of the Courts, it seems incongruous that the Stokes would now complaint that the court is invested with equitable powers.

While the Trial Court should have imposed equity at the time it dissolved Millen Roofing's construction lien against the Stokes property, the fact that a Trial Court sought to do to equity during the course of that lawsuit was entirely appropriate. Consequently, Millen Roofing believes the appropriate remedy is to remand the matter back to the Trial Court with instruction to enter a money judgment against the Stokes in the amount of One Hundred Thirteen Thousand Two Hundred Sixty-nine Dollars ($113,269.00), plus return to Millen Roofing the funds it paid into escrow pursuant to the Trial Court's May 28, 1998 judgment.

2. An equitable remedy was appropriate based on the facts of this case.

The Trial Court allowed two of Millen Roofing's counts to proceed to trial: A count for claim and delivery/recovery of materials used on the roof and a count for accord and satisfaction. The Trial Court found that an accord and satisfaction had not been made. However, the Court did award damages based on Millen's claim for recovery of the materials used on the Stokes' roof.

It is clear that this section of the Residential Builders Act does not bar a claim for recovery of materials used, but not paid for. The Act simply prohibits an unlicensed contractor from recovering compensation for the work performed. The Trial Court fashioned a remedy that would allow all parties to be put in the same position they occupied prior to their dealings with each other. The Trial Court held that before Millen would be allowed to repossess the materials used on the roof, it would have to repay the payments received from the Stokes. If the Stokes desired to retain the roof which was in no way defective, the Trial Court found that the equity of the case would require the Stokes to pay the amount they admitted was due.

In short, the Trial Court fashioned an equitable remedy that it believed was commensurate with the equities of the case. The decision allowed Millen to remove the roof. As an equitable act to the Stokes, the Judge then allowed them one last opportunity to pay the amount they admitted was due and keep the roof. The Trial Court was not willing to let the Stokes use the Residential Builders Act as a sword to again get something without paying for it. Trial Courts must be accorded considerable latitude in fashioning equities commensurate with the equities of the case. Governale v Owosso, 59 Mich App 756, 229 NW2d 918 (1975).

In the Governale case, the City of Owosso trespassed onto the Plaintiffs' property and installed a waterline by mistake. The Plaintiffs sought to prohibit the City from removing the waterline based on the theory that once installed, the waterline became part and parcel of the realty. The Trial Court entered an Order allowing the City to remove the waterline on the condition that it restore the land to a good and proper condition. The Court of Appeals stated: "The relief was both fair and appropriate. We

believe that the Court's Order in this regard was reasonable." Governale, 229 NW2d at 922. Obviously, the Trial Court's hands cannot be irrevocably tied from providing relief when a party has done something wrong. Otherwise the City of Owosso would have lost. In this case the remedy fashioned by the Trial Court is also fair and appropriate under the circumstances of this case and should be allowed to stand.

The Trial Court was justified in considering that not only did Mrs. Stokes solicit Millen to work in Michigan when he was unlicensed, but she and her agents put considerable threat and force to bear threatening legal action on a contract she now claims is not enforceable.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Defendant requests that this Court reverse the Court of Appeals and the Trial Court on that portion of the lower court's decision which dismissed Defendant's counter complaint for legal relief.

Respectfully Submitted,

Dated: January 15, 2002

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